BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL K. HAYSLETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 163,234; 163,235
ROCKWELL INTERNATIONAL	)	165,474
Respondent	)	
AND	)	
	)	
SELF INSURED	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON the 17th day of February, 1994, the application of the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward on January 5, 1994, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by and through his attorney, Mark S. Gunnison, of Overland Park, Kansas. The respondent, a qualified self-insured, appeared by and through its attorney, Larry R. Mears, of Atchison, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Ronald P. Wood, of Overland Park, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as set forth by the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What is the nature and extent of disability as a result of the accident suffered by claimant on June 14, 1982, March 27, 1983 and October 28, 1985? Has claimant sustained a work disability as a result of any of these accidents?

(2) Is claimant entitled to future medical treatment?

(3) What is the liability of the Kansas Workers Compensation Fund?

(4) What, if any, compensation is due to the claimant?

(5) What, if any, credit is the Kansas Workers Compensation Fund entitled under K.S.A. 44-510a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The claimant is entitled to a five percent (5%) general body functional impairment as a result of the injury of June 14, 1982 to his foot and back. Claimant is further entitled to a 15 percent (15%) whole body functional impairment as a result of the injury suffered to his back on March 27, 1984. Claimant is further entitled to a 33-1/3 percent (33.33%) work disability as a result of the reduction in his ability to perform work of the same type and character he was performing at the time of the accident on October 28, 1985.

Claimant worked for respondent since March 1973, where, with the exception of the

first four months, he worked as a heat treat operator during his entire employment. Claimant remains on that same job with accommodation at this time.

On June 14, 1982 claimant was hit by a forklift causing damage to his left foot and leg with minor damage to his low back. At the time of the injury claimant felt the most severe problem was in the foot and leg but testified to hurting all over with minor problems to the back and leg. He failed to advise the respondent of the back pain due to the overwhelming pain in the foot and leg.

Claimant missed no work as a result of this injury but did suffer fractures of three toes on his foot causing him to favor the foot and walk primarily on his heel thereafter. Claimant sought no medical care for the back injury from this accident.

On March 27, 1984, while picking up a test bar, claimant experienced a sudden, severe pain in his low back with radiculopathy into his lower extremities. This injury was reported to the respondent and the claimant was provided ongoing medical care. Again, claimant missed no work and again he returned to his job as heat treat operator with no change in work responsibilities. Claimant was treated by several doctors during this period of time, none of whom, unfortunately, were deposed during the litigation of this matter.

Subsequent to the 1984 date of accident the respondent filed a Form 88 with the Division of Workers Compensation in Topeka, Kansas, showing claimant's handicap to the "spine."

On October 28, 1985, while stepping off an oven, claimant again experienced a sudden onset of pain in his low back and hip. The pain was more severe than that experienced in 1984 but did ultimately settle back to the 1984 level. Subsequent to this injury claimant altered his job responsibilities in that he ceased lifting weights in excess of 20 pounds on a regular basis. He was able to return to his same job with this accommodation using an overhead crane and fellow employees any time he encountered a situation when lifting in excess of 20 pounds was required.

The portion of K.S.A. 44-510e(a) applicable in 1985 read:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced."

The pivotal question is, what portion of the claimant's job requirements is he or she unable to perform because of the injury? Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984).

Claimant was examined by Dr. John J. Wertzberger on April 18, 1991. The claimant's history to Dr. Wertzberger indicated accidents in 1982 and in 1984. Dr. Wertzberger was also provided a medical history indicating claimant had suffered an injury in October, 1985 as well. Dr. Wertzberger rated claimant at five percent (5%) permanent

partial impairment to the left foot due to the problems associated with the 1982 injury. He further assessed a 16 percent (16%) permanent partial impairment to the body as a whole as a result of claimant's multiple low back, lumbar disk and radicular problems. Combined, Dr. Wertzberger opined, claimant had an 18 percent (18%) whole body impairment as a result of the injuries described above.

Dr. Wertzberger, when asked about apportionment opined a 20 percent (20%) contribution from the 1982 injury, a 70 percent (70%) contribution from the 1984 injury and a 10 percent (10%) contribution from the 1985 injury would be appropriate.

Claimant was also examined by Dr. Edward J. Prostic on May 28, 1992. Dr. Prostic discussed only the injuries in 1982 and 1984 having been made aware of the 1985 injury shortly before his deposition. Dr. Prostic assessed a 20 percent (20%) impairment to the foot and 2.5 percent (2.5%) impairment to the spine from the 1982 injury indicating an overall impairment of 10 to 12 percent (10-12%) to the body as a whole on a functional basis. He further opined that claimant's impairment was increased to 20 percent (20%) to the body as a whole as a result of the 1984 spine injury.

Both doctors agree claimant was capable of returning to work at his former job with accommodation. Dr. Prostic specifically adopted the limitations of Dr. Maeda. The claimant also testified, absent objection by counsel, that he was following the 15 to 20 pound lifting restrictions of Dr. Maeda. While the medical records of Dr. Maeda were never placed into evidence the Appeals Board finds that the testimony of the claimant and Dr. Prostic would be sufficiently credible to support the 15 to 20 pound lifting restriction as appropriate.

K.S.A. 44-501 applicable in 1985 stated in part:

> "If in any employment to which the workman's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, his or her employer shall be liable to pay compensation to the employee in accordance with the provisions of the workman's compensation act. In proceedings under the workman's compensation act, the burden of proof shall be on the claimant to establish his or her right to an award of compensation by proving the various conditions on which his or her right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991). The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own decision. Id. at 785.

The functional impairment ratings of Dr. Wertzberger and Dr. Prostic do differ although both agree the 1982 injury suffered by claimant resulted in an impairment to both his foot and his low back. Considering all of the evidence in the record the Appeals Board finds claimant suffered a five percent (5%) general body impairment as a result of the 1982 injury to his foot and back. As claimant was capable of engaging in work of the same type and character that he was performing at the time of the injury, subsequent to this injury, no work disability is appropriate.

There were no restrictions placed upon the claimant by any of the treating doctors until subsequent to his injury in 1985. As such, the Appeals Board finds claimant suffered no work disability as a result of the 1984 injury to his back and lower extremities. Dr. Wertzberger found that of the 18 percent (18%) impairment he assessed to claimant as a result of his injuries, 70 percent (70%) was attributable to the 1984 injury. This computes to a 12.6 percent (12.6%) impairment on a functional basis. Dr. Prostic opined that claimant's functional impairment had increased to 20 percent (20%) to the body as a whole due to the 1984 injury. The Appeals Board, again being the trier of fact, is not bound by medical evidence and does have the responsibility of making its own determination. A 15 percent (15%) impairment to the body as a whole would seem appropriate taking into consideration the evidence and the record as a whole.

Dr. Prostic did state that but for the preexisting low back injury of 1982, claimant probably or most likely would not have suffered a significant injury in March 1984.

K.S.A. 1992 Supp. 44-567(b) provides:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain employer's burden of proof with regard thereto."

As the claimant failed to inform the employer of any significant problems with his back subsequent to his injury in 1982 and absent any evidence indicating the employer had knowledge of this preexisting condition, the respondent would not be entitled to any contribution from the Kansas Workers Compensation Fund as a result of the injury suffered in 1984, and the Appeals Board so finds.

Subsequent to the October 28, 1985 injury, claimant did alter his work responsibilities and adjust his work load in electing to follow the restrictions set forth by Dr. Maeda. Claimant limited himself to 15 to 20 pounds maximum lift on a permanent basis. Claimant was able to accomplish this accommodation on his own through the use of the overhead crane and the assistance of fellow workers any time lifting in excess of 20 pounds was required. While claimant was capable of returning to the exact same job he performed prior to the injury as is indicated earlier, the pivotal question is what portion of the claimant's job requirements is he unable to perform because of the injury? Ploutz, supra at 955.

The claimant testified that one-third (33.33%) of his job required lifting in excess of 20 pounds. He further opined that he adjusted or accommodated his job duties through the use of an overhead crane and fellow workers in order to avoid having to exceed the 20 weight lifting restriction placed on him by Dr. Maeda. While it is the claimant's burden under K.S.A. 44-501 and K.S.A. 44-508(g) to prove his claim by a preponderance of the credible evidence, it is also true that uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The claimant's testimony regarding his modification of job duties is uncontradicted and appears reasonable and probable under the circumstances and is considered to be trustworthy by the Appeals Board.

The Appeals Board finds claimant has suffered a 33.33 percent work disability as a result of the reduction in his ability to perform work of the same type and character that he was doing at the time of the accident in 1985.

(2) The Appeals Board finds that claimant shall be entitled to future medical treatment without need for specific approval with Dr. Donovan for problems associated with the injury to his foot. Claimant will be granted future medical treatment for care of his back upon proper application to and approval by the Director of Workers Compensation.

(3) The Kansas Workers Compensation Fund has incurred no liability as a result of the 1982 or 1984 injuries to the claimant. There was no evidence presented to indicate claimant had a condition which preexisted his 1982 injury, and the respondent was unaware of the claimant's back condition prior to his injury in 1984. Liability will be assessed against the Kansas Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work related injury. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

In order for an employer to be relieved of liability either in whole or partially from the Kansas Workers Compensation Fund, it is the employer's responsibility and burden to show that it hired or retained a handicapped employee after acquiring knowledge of a preexisting impairment. K.S.A. 44-567(b).

The employer has failed in its burden of proving that it knowingly hired or retained a handicapped employee in its employment after acquiring knowledge of this handicap. The evidence clearly shows the employer did not acquire knowledge of claimant's back problems until subsequent to the injury in 1984.

The liability of the Kansas Workers Compensation Fund for the injury in 1985 is an altogether different story.

The purpose of the Kansas Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by the employees. K.S.A. 44-567(a); Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The respondent filed a Form 88 subsequent to the 1984 injury and prior to the 1985 date of accident showing claimant had a handicap to his spine. The medical records from that time clearly show claimant's handicap involved his low back and his lower extremities. The Appeals Board finds that the employer, subsequent to the claimant's injury in 1984, knowingly retained a handicapped employee after acquiring knowledge of this preexisting impairment.

K.S.A. 1992 Supp. 44-567(a)(2) provides:

> "Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

K.S.A. 44-567(a)(1) provides in part:

> "Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefore, and finds that the injury, disability or death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

Dr. Prostic opined that but for the preexisting low back disease, claimant probably or most likely would not have suffered a significant injury during the March 27, 1984 lifting incident. Dr. Prostic gives no opinion regarding the potential Fund liability from the 1985 incident. Dr. Wertzberger gives no opinion regarding "but for" from the 1985 injury. As earlier stated the employer has the burden of proving that it hired or retained a handicapped employee after acquiring knowledge of the preexisting impairment and, when claiming "but for", also has the burden of showing that the appropriate statutory obligations have been met. In this matter the employer has failed to prove that "but for" the preexisting impairment claimant would not have suffered the injury on or about October 28, 1985.

The employer has, however, shown that the injury, which would have been sustained without regard to the preexisting impairment, was clearly contributed to by the preexisting impairment. Dr. John Wertzberger in discussing the 1985 injury and his 18 percent (18%) whole body impairment attributed 20 percent (20%) of the entire impairment to the 1982 injury, 70 percent (70%) to the 1984 injury and 10 percent (10%) to the 1985 injury. As such the Appeals Board finds that 90 percent (90%) of the claimant's impairment from the 1985 injury preexisted the date of accident. It is the Appeals Board determination that the Kansas Workers Compensation Fund shall be responsible for 90 percent (90%) of all costs associated with the claimant's injury of October 28, 1985, with the respondent being responsible for 10 percent (10%) of the costs associated with said injury.

The Kansas Workers Compensation Fund alleges a credit is due under K.S.A. 44-510a. If a worker suffers a compensable injury which renders him handicapped and later sustains a new injury contributed to by his handicap, he will not be permitted to stack permanent disability payments as if the injuries were unrelated or compensated from different sources. The Appeals Board finds that, based upon the credible evidence in the record, the Kansas Workers Compensation Fund would be entitled to a 20 percent (20%) credit for the award stemming from the injury of June 14, 1982; and a 70 percent (70%) credit for the award stemming from the injury of March 27, 1984, both as a result of the preexisting impairment suffered by the claimant in this matter.

(4) As a result of the injury occurring on or about June 14, 1982, the Appeals Board finds claimant is entitled to a five percent (5%) permanent partial disability to the body as a whole. The Kansas Workers Compensation Fund will have no responsibility for any portion of the liability associated with this injury.

For the accidental injury of March 27, 1984, claimant is awarded a 15 percent (15%)

permanent partial disability to the body as a whole with appropriate credit to be assessed under K.S.A. 44-510a.

For the accidental injury of October 28, 1985, claimant is awarded a 33½ percent (33.5%) permanent partial disability to the body as a whole. The Kansas Workers Compensation Fund shall reimburse to respondent 90 percent (90%) of its costs and expenses stemming from this award.

The Kansas Workers Compensation Fund is further entitled to a 20 percent (20%) credit to be made from the compensation awarded for the injury in 1982, and a 70 percent (70%) credit to be made from the compensation awarded for the injury in 1984, with appropriate amounts to be deducted from the 1985 award during the periods of overlap.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that claimant shall be awarded compensation for injuries suffered on June 14, 1982, March 27, 1984 and October 28, 1985 as follows:

Claimant is entitled to 415 weeks of compensation at the reduced rate of $11.04 per week in the sum of $4,581.60 all of which is due and owing in one lump sum for the injury occurring on or about June 14, 1982 resulting from claimant's entitlement to a five percent (5%) permanent partial disability to the body as a whole on a functional basis. The Kansas Workers Compensation Fund shall have no responsibility for any portion of this award.

As a result of the injury occurring on March 27, 1984, claimant shall be entitled to 320.29 weeks of compensation at the reduced rate of $34.51 per week totalling $11,053.21 followed by 94.71 weeks of compensation at the unreduced rate of $36.72 totalling $3,477.75 for a total award of $14,530.96 all of which is due and payable in one lump sum. The Kansas Workers Compensation Fund shall have no responsibility for any portion of this award.

For the accidental injury of October 28, 1985, claimant is awarded 237.29 weeks of compensation at the reduced rate of $58.33 per week totalling $13,841.13, followed by 94.71 weeks of compensation at the reduced rate of $60.54 per week totalling $5,733.74, followed thereafter by 83 weeks of compensation at the unreduced rate of $86.24 per week in the sum of $7,157.92, making a total award of $26,732.79 all of which is due and owing and payable in one lump sum. The Kansas Workers Compensation Fund shall reimburse to the respondent 90 percent (90%) of all costs and expenses stemming from this award.

The Appeals Board finds claimant shall be entitled to future medical treatment without need for specific approval with Dr. Donovan for problems associated with the injury to his foot. Claimant will be granted future medical treatment for care of his back upon proper application to and approval by the Director of Workers Compensation.

The Appeals Board further finds that the Kansas Workers Compensation Fund shall reimburse to the respondent 90 percent (90%) of its costs and expenses for all compensation connected with the award for the accidental injury of October 28, 1985.

The Appeals Board finds claimant's attorney is granted a lien against the proceeds of this award for not more than 25 percent (25%) of the total award pursuant to K.S.A. 1992 Supp. 44-536.

The Appeals Board finds that the fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent with reimbursement to the respondent by the Kansas Workers Compensation Fund for 90 percent (90%) of any and all fees involved in the litigation of this matter as follows:

APPINO & ACHTEN REPORTING SERVICE	$ 200.80
GENE DOLGINOFF & ASSOCIATES	$ 246.60
PAMELA L. LAMAR, CSR	$ 388.30
NORA LYON & ASSOCIATES, INC.	$ 220.80

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: Mark S. Gunnison, 7101 College Blvd, Ste 200, Overland Park, KS 66210
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James R. Ward, Administrative Law Judge
George Gomez, Director